

ESTTA Tracking number: **ESTTA706642**

Filing date: **11/04/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Top Tobacco L.P.
Granted to Date of previous extension	12/02/2015
Address	2301 Ravine Way Glenview, IL 60025 UNITED STATES

Attorney information	Antony J. McShane Neal, Gerber & Eisenberg, LLP 2 North LaSalle Street, Suite 1700 Chicago, IL 60602 UNITED STATES amcshane@ngelaw.com, afraker@ngelaw.com, temanuelson@ngelaw.com, lgonzalez@ngelaw.com, ECFDocket@ngelaw.com Phone:312.269.8000
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Applicant Information

Application No	86570857	Publication date	08/04/2015
Opposition Filing Date	11/04/2015	Opposition Period Ends	12/02/2015
Applicant	Nu Mark LLC 6603 W. BROAD STREET RICHMOND, VA 23230 UNITED STATES		

Goods/Services Affected by Opposition

Class 009. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Batteries, battery chargers, and car power adapters for electronic cigarettes, electronic cigars, electronic cigarillos, e-vapor devices, and vaporizers

Applicant Information

Application No	86634292	Publication date	10/06/2015
Opposition Filing Date	11/04/2015	Opposition Period Ends	11/05/2015
Applicant	Nu Mark LLC 6603 W. BROAD STREET RICHMOND, VA 23230 UNITED STATES		

Goods/Services Affected by Opposition

Class 009. First Use: 0 First Use In Commerce: 0

All goods and services in the class are opposed, namely: Batteries, battery chargers, and car power adapters for electronic cigarettes, electronic cigars, electronic cigarillos, e-vapor devices, and vaporizers

Applicant Information

Application No	86634297	Publication date	10/06/2015
Opposition Filing Date	11/04/2015	Opposition Period Ends	11/05/2015
Applicant	Nu Mark LLC 6603 W. BROAD STREET RICHMOND, VA 23230 UNITED STATES		

Goods/Services Affected by Opposition

Class 034. First Use: 0 First Use In Commerce: 0

All goods and services in the class are opposed, namely: Tobacco products, namely, electronic cigarettes, electronic cigars, electronic cigarillos and smokeless electronic cigarette, cigar and cigarillo vaporizer pipes; carrying cases and containers for electronic cigarettes, electronic cigars, electronic cigarillos and smokeless electronic cigarette, cigar and cigarillo vaporizer pipes

Applicant Information

Application No	86634298	Publication date	10/06/2015
Opposition Filing Date	11/04/2015	Opposition Period Ends	11/05/2015
Applicant	Nu Mark LLC 6603 W. BROAD STREET RICHMOND, VA 23230 UNITED STATES		

Goods/Services Affected by Opposition

Class 034. First Use: 0 First Use In Commerce: 0

All goods and services in the class are opposed, namely: Tobacco products, namely, electronic cigarettes, electronic cigars, electronic cigarillos and smokeless electronic cigarette, cigar and cigarillo vaporizer pipes; carrying cases and containers for electronic cigarettes, electronic cigars, electronic cigarillos and smokeless electronic cigarette, cigar and cigarillo vaporizer pipes

Applicant Information

Application No	86634312	Publication date	10/06/2015
Opposition Filing Date	11/04/2015	Opposition Period Ends	11/05/2015
Applicant	Nu Mark LLC 6603 W. BROAD STREET RICHMOND, VA 23230 UNITED STATES		

Goods/Services Affected by Opposition


Class 009. First Use: 0 First Use In Commerce: 0


All goods and services in the class are opposed, namely: Batteries, battery chargers, and car power adapters for electronic cigarettes, electronic cigars, electronic cigarillos, e-vapor devices, and vaporizers

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	4035297	Application Date	03/04/2008
Registration Date	10/04/2011	Foreign Priority Date	NONE
Word Mark	REAL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 034. First use: First Use: 2011/08/10 First Use In Commerce: 2011/08/10 Tobacco		

U.S. Registration No.	4837453	Application Date	02/04/2014
Registration Date	10/20/2015	Foreign Priority Date	NONE
Word Mark	REAL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 001. First use: First Use: 2014/04/25 First Use In Commerce: 2014/04/25 Cartridges sold filled with propylene glycol for electronic cigarettes; Cartridges sold filled with vegetable glycerin for electronic cigarettes Class 005. First use: First Use: 2014/04/25 First Use In Commerce: 2014/04/25 Imitation cigarettes for quitting smoking Class 009. First use: First Use: 2014/04/25 First Use In Commerce: 2014/04/25 Electronic cigarette batteries		

	<p>Class 030. First use: First Use: 2014/04/25 First Use In Commerce: 2014/04/25 Cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes; Chemical flavorings in liquidform used to refill electronic cigarette cartridges; Electronic cigarette liquid (e-liquid) comprised of liquid used to refill electronic cigarette cartridges</p> <p>Class 034. First use: First Use: 2014/04/25 First Use In Commerce: 2014/04/25 electronic cigarettes</p>
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Attachments	<p>77412357#TMSN.png(bytes)</p> <p>86184363#TMSN.png(bytes)</p> <p>Consolidated Notice of Opposition - Nu Mark REAL Formative Marks_2_.pdf(16724 bytes)</p> <p>EX A.pdf(53790 bytes)</p> <p>EX B.pdf(60116 bytes)</p>
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Antony McShane/
Name	Antony J. McShane
Date	11/04/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial Nos.:
86/570,857 for REAL TASTE;
86/634,292 for DISCOVER REAL TASTE;
86/634,297 for DISCOVER REAL TASTE;
86/634,298 for EXPERIENCE REAL TASTE;
and
86/634,312 for EXPERIENCE REAL TASTE

Published in the Official Gazette on:
August 4, 2015 and October 6, 2015

TOP TOBACCO L.P.

Opposer,

v.

NU MARK, LLC

Applicant.

**CONSOLIDATED NOTICE OF
OPPOSITION**

This Consolidated Notice of Opposition is submitted in the matter of applications by Nu Mark, LLC to register the marks REAL TASTE, DISCOVER REAL TASTE and EXPERIENCE REAL TASTE (collectively, the “REAL Formative Marks”) based upon its intent to use the marks in connection with electronic cigarettes and related products. Specifically, Applicant seeks to register the mark REAL TASTE based on its intent to use the mark in connection with “batteries, battery chargers, and car power adapters for electronic cigarettes, electronic cigars, electronic cigarillos, e-vapor devices, and vaporizers” in Class 9 (Serial No. 86/570,857); the mark DISCOVER REAL TASTE based on its intent to use the mark in connection with “batteries, battery chargers, and car power adapters for electronic cigarettes, electronic cigars, electronic cigarillos, e-vapor devices, and vaporizers” in Class 9 (Serial No. 86/634,292) and “tobacco products, namely, electronic cigarettes, electronic cigars, electronic cigarillos and

smokeless electronic cigarette, cigar and cigarillo vaporizer pipes; carrying cases and containers for electronic cigarettes, electronic cigars, electronic cigarillos and smokeless electronic cigarette, cigar and cigarillo vaporizer pipes” in Class 34 (Serial No. 86/634,297); and the mark EXPERIENCE REAL TASTE based on its intent to use the mark in connection with “Batteries, battery chargers, and car power adapters for electronic cigarettes, electronic cigars, electronic cigarillos, e-vapor devices, and vaporizers” in Class 9 (Serial No. 86/634,312) and “tobacco products, namely, electronic cigarettes, electronic cigars, electronic cigarillos and smokeless electronic cigarette, cigar and cigarillo vaporizer pipes; carrying cases and containers for electronic cigarettes, electronic cigars, electronic cigarillos and smokeless electronic cigarette, cigar and cigarillo vaporizer pipes” in Class 34 (Serial No. 86/634,298). Top Tobacco L.P., a Delaware limited partnership, having a place of business at 2301 Ravine Way, Glenview, Illinois 60025, believes that it would be damaged by the registration and therefore opposes the same.

The grounds for Opposition herein are as follows:

1. For long before the acts of Applicant alleged herein, Top Tobacco, including its predecessors and affiliates (“Top Tobacco”), has been engaged in, *inter alia*, the manufacture, distribution and sale of smokers’ articles including tobacco and related products such as cigarette rolling papers, filter tips, cigarette tubes, machines for making and injecting cigarettes, electronic cigarettes (and components thereof and accessories therefor) and electronic cigarette liquids. Top Tobacco distributes such goods to consumers across the United States through thousands of tobacco shops, drugstores, tobacco outlets, convenience and other retail stores.

2. Top Tobacco has devoted substantial resources, time and effort to marketing and distributing its products under and in connection with a number of well-known and industry-leading brands, including REAL.

3. On March 4, 2008, Top Tobacco filed an application to register the REAL mark based on its intent to use the mark in connection with tobacco. Top Tobacco began use of the REAL mark in August 2011 in connection with a unique blend of tobacco used by smokers to roll their own cigarettes. The REAL mark was registered in connection with tobacco on October 4, 2011 (*see* Reg. No. 4,035,297, attached hereto as Exhibit A). Top Tobacco has developed considerable recognition and goodwill in its REAL mark in connection with tobacco, which is now among Top Tobacco's most valuable assets.

4. On February 4, 2014, Top Tobacco filed an Application to register its REAL mark based on its intent to use the mark in connection with electronic cigarettes in International Class 34 and components of and accessories for electronic cigarettes in various other classes. Top Tobacco began to use its REAL mark in connection with these goods on April 25, 2014, and the REAL mark was registered in connection with these goods on October 20, 2015 (*see* Reg. No. 4,837,453, attached hereto as Exhibit B).

5. On March 20, 2015, after Top Tobacco filed its application to register its REAL mark in connection with electronic cigarettes, components and accessories, and after Top Tobacco began to use the mark in connection with such goods, Applicant filed Application Serial No. 86/570,857 to register the mark REAL TASTE based upon its intent to use the mark in connection with batteries, battery chargers, and car power adapters for electronic cigarettes, electronic cigars, electronic cigarillos, e-vapor devices, and vaporizers in International Class 9.

6. On May 19, 2015, Applicant filed applications to register the mark DISCOVER REAL TASTE based upon its intent to use the mark in connection with batteries, battery chargers, and car power adapters for electronic cigarettes, electronic cigars, electronic cigarillos, e-vapor devices, and vaporizers in International Class 9 (Serial No. 86/634,292) and tobacco

products, namely, electronic cigarettes, electronic cigars, electronic cigarillos and smokeless electronic cigarette, cigar and cigarillo vaporizer pipes; carrying cases and containers for electronic cigarettes, electronic cigars, electronic cigarillos and smokeless electronic cigarette, cigar and cigarillo vaporizer pipes in Class 34 (Serial No. 86/634,297).

7. On May 19, 2015, Applicant also filed applications to register the mark EXPERIENCE REAL TASTE based on its intent to use the mark in connection with the goods listed in Paragraph 6 above in Class 9 (Serial No. 86/634,312) and Class 34 (Serial No. 86/634,298).

8. The REAL Formative Marks that Applicant seeks to register are confusingly similar to Top Tobacco's REAL mark. As a result of, *inter alia*, the similarity of the parties' marks, the identical and closely related goods associated with the marks, and the strength of Top Tobacco's REAL mark, Applicant's use and registration of the REAL Formative Marks is likely to cause confusion or mistake, or to deceive purchasers, in that purchasers would be likely to believe that Applicant's goods are Top Tobacco's goods, or are in some way legitimately connected with, sponsored by, or approved by Top Tobacco in violation of 15 U.S.C. § 1052(d). Applicant's registration of the REAL Formative Marks would therefore damage Top Tobacco, and on that basis, Top Tobacco opposes registration of the marks by Applicant.

WHEREFORE, Top Tobacco requests that the registrations sought by Applicant be refused and that this Notice of Opposition be sustained.

Respectfully submitted,

Date: November 4, 2015

By: /Antony J. McShane/
One of the Attorneys for Top Tobacco L.P.

Antony J. McShane
Andrew S. Fraker
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street, Suite 1700
Chicago, Illinois 60602-3801
(312) 269-8000

CERTIFICATE OF SERVICE

I, Andrew S. Fraker, state that I served a copy of the foregoing Notice of Opposition
upon:

Robyn Ettricks
Altria Client Services Inc.
601 E. Jackson St.
Richmond, Virginia 23219

via First Class U.S. Mail, with a courtesy copy sent via email, on November 4, 2015.

_____/Andrew S. Fraker/

016471.6018:22023201.1

EXHIBIT A



Trademarks > Trademark Electronic Search System (TESS)

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REAL

Word Mark	REAL
Goods and Services	IC 034. US 002 008 009 017. G & S: Tobacco. FIRST USE: 20110810. FIRST USE IN COMMERCE: 20110810
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77412357
Filing Date	March 4, 2008
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	June 3, 2008
Registration Number	4035297
Registration Date	October 4, 2011
Owner	(REGISTRANT) Top Tobacco, LP Top Tobacco Management Corp., an Illinois corporation LIMITED PARTNERSHIP DELAWARE 2301 Ravine Way Glenview ILLINOIS 60025
Attorney of Record	Antony J. McShane
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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EXHIBIT B



Trademarks > Trademark Electronic Search System (TESS)

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TSDR ASSIGN Status TTAB Status (Use the "Back" button of the Internet Browser to return to TESS)

REAL

Word Mark	REAL
Goods and Services	IC 001. US 001 005 006 010 026 046. G & S: Cartridges sold filled with propylene glycol for electronic cigarettes; Cartridges sold filled with vegetable glycerin for electronic cigarettes. FIRST USE: 20140425. FIRST USE IN COMMERCE: 20140425 IC 005. US 006 018 044 046 051 052. G & S: Imitation cigarettes for quitting smoking. FIRST USE: 20140425. FIRST USE IN COMMERCE: 20140425 IC 009. US 021 023 026 036 038. G & S: Electronic cigarette batteries. FIRST USE: 20140425. FIRST USE IN COMMERCE: 20140425 IC 030. US 046. G & S: Cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes; Chemical flavorings in liquid form used to refill electronic cigarette cartridges; Electronic cigarette liquid (e-liquid) comprised of liquid used to refill electronic cigarette cartridges. FIRST USE: 20140425. FIRST USE IN COMMERCE: 20140425 IC 034. US 002 008 009 017. G & S: electronic cigarettes. FIRST USE: 20140425. FIRST USE IN COMMERCE: 20140425
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	86184363
Filing Date	February 4, 2014
Current Basis	1A
Original Filing Basis	1B
Published for	

Opposition	June 10, 2014
Registration Number	4837453
Registration Date	October 20, 2015
Owner	(REGISTRANT) Top Tobacco L.P. Top Tobacco Management Corp., an Illinois Corporation LIMITED PARTNERSHIP DELAWARE 2301 Ravine Way Glenview ILLINOIS 60025
Attorney of Record	ANTONY J MCSHANE
Prior Registrations	4035297
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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